SUPREME COURT, U. S.
AUG 14 1975
MICHAEL RODAK, JR., CLERK

No. 75-237

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

JAMES L. COBB,

Petitioner,

vs.

UNITED STATES OF AMERICA

and

CHARLES T. REHLING, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdictional Statement | 2 |
| Questions Presented for Review | 2 |
| Constitutional Provisions | 2 |
| Statement of Facts | 2 |
| Reasons for Granting Writ | 5 |
| Argument | 5 |
| Conclusion | 13 |
| Appendix A — Constitutional Provisions | 1a |
| Appendix B — Opinion Below | 2a |
| Appendix C — District Court Opinion | 7a |
| Appendix D — Original Complaint | 11a |


## TABLE OF CITATIONS


| | |
|---|---|
| Bellis v. U.S., 40 L.E. 2d 678 | 5 |
| Boyd v. U.S., 116 U.S. 616 (1886) | 5 |
| Gilbert v. California, 384 U.S. 757 (1965) | 5 |
| Hubner v. Tucker, 245 F. 2d 35 (9th Cir., 1957) | 8 |
| In re: Subpoena Duces Tecum, 81 F.Supp. 418, 421 (ND Cal., 1948) | 6 |
| Jones v. Securities & Exchange Commission, 298 U.S. 1, 27 (1936) | 7-8 |
| Smith v. Kelly, et al., 465 SW2d 39 (1971) | 11 |

Page

U.S. v. Detroit Vital Foods, 407 F. 2d 570 (6th Cir., 1969) ..... 6

U.S. v. Kleckner, 273 F.Supp. 251 (1967), Appeal Dismissed, 6th Cir., 382 F. 2d 1022 ..... 6

U.S. v. O'Connor, 118 F.Supp. 248, 250, (D.Mass. 1953) ..... 7

U.S. v. Parrott, 248 F.Supp. 196, 202, (D.D.C. 1965) (SEC Case) ..... 6

U.S. v. Slutsky, 352 F.Supp. 1105 (SDNY, 1972) .. 6

**Other Authorities:**

I. R. C. § 7602, et seq. ..... 7

KRS 362.180 ..... 9

KRS 362.180 (2) .....9, 10

KRS 362.180 (3) .....9, 10, 11

KRS 362.180 (4) .....9, 11

Constitutional Provisions

Fourth Amendment ..... 1a

Fifth Amendment ..... 1a

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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James L. Cobb, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on May 16, 1975.

## OPINION BELOW

The decision of the Sixth Circuit Court below is reported as Appendix B and the District Court Memorandum and Order are reproduced as Appendix C.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254.

## QUESTIONS PRESENTED

I. MAY THE PETITIONER ASSERT AS "PRIVILEGED" THE FINANCIAL RECORDS OF HIS LAW PRACTICE?

II. IS THE USE OF A "SUMMONS" ISSUED TO PETITIONER BY A SPECIAL AGENT OF THE IRS ENGAGED IN GATHERING EVIDENCE FOR A POSSIBLE CRIMINAL ACTION AGAINST PETITIONER AN UNWARRANTED INTRUSION ON THE PETITIONER UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION?

III. DOES THE FILING OF IRS FORM 1065 BY ATTORNEYS ASSOCIATED TOGETHER IN THE PRACTICE OF LAW, PRECLUDE THEIR INDIVIDUAL CLAIM OF PRIVILEGE?

## APPLICABLE CONSTITUTIONAL PROVISIONS

These are set forth in Appendix A.

## STATEMENT OF FACTS

The Petitioner practices law in Covington, Kentucky, and the Respondent, a Special Agent with the Internal Revenue Service, has undertaken an investigation of the Petitioner's personal income tax returns for the Calendar Year 1971 and 1972.

During the Calendar year 1971, the Petitioner practiced law in association with one Peter F. Beasley (now de-

ceased). During the Calendar Year 1972, the Petitioner practiced law in association with Peter F. Beasley and William C. Oldfield.

Internal Revenue Service Informational Forms 1065 were filed for each of the years under investigation as well as Petitioner's individual Form 1040. No written or formalized partnership agreement existed between Peter F. Beasley in the year 1971, nor does a written formalized agreement exist for the year 1972. Moreover, there existed no formal detailed agreement or understanding between the parties concerning the division of net revenues or payment of expenses. The procedure, best described as informal, was that receipts were deposited in a common account upon which checks were written to pay the office expenses, including the disbursement of monies to clients.

In 1971, whenever Mr. Beasley or Petitioner needed funds for their personal expenses, they would write themselves a check for whatever amount was needed, assuming that sufficient funds existed to cover their needs. During the year 1971, there was no attempt by either Mr. Beasley or Petitioner to regulate the amount of money withdrawn, nor were either of them required, or limited, to drawing any certain amount per week or per month. Moreover, a check of the 1971 joint account of Peter F. Beasley and Petitioner shows that one party withdrew $1,100.00 more than the other party and one party wrote sixty-six drawing checks while the other party wrote just twenty.

The procedure followed for the year 1972 was substantially the same as for the year 1971, with the exception that three parties were now involved — Peter F. Beasley, William C. Oldfield, and the Petitioner. The joint account for the year 1972 reveals a $500.00 difference between two of the parties and approximately a $3,200.00

and $2,700.00 difference between the third party and the first and second parties, respectively.

Respondent, Charles T. Rehling, a Special Agent of the Internal Revenue Service, accompanied by another agent, came to the Petitioner's office in Covington, Kentucky, and advised the Petitioner that they were investigating the Petitioner's income tax returns for 1971 and 1972.

Respondent then proceeded to read Petitioner his constitutional rights and finished by saying, "You, of course, don't have to talk to me at all."

Thereafter, Special Agent Rehling asked for all of Petitioner's records for 1971 and 1972. Petitioner refused this request and subsequently a Summons was issued by Respondent commanding that all of the records used in the preparation of the tax returns (Form 1065) for 1971 and 1972 be produced to the Respondent, including the General Ledger; Cash Receipts Journal; Cash Disbursements Journal; Expense Journal; Cancelled Checks; Bank Statements; Work Papers; Summaries; and Trial Balances. Petitioner refused and a Petition to enforce the Internal Revenue Summons was filed in the District Court.

The Petitioner, James L. Cobb, raised as a defense to enforceability of the Summons that he is entitled to assert his constitutional protection and privilege against divulging the information which is sought by the Respondent and that the Summons is an unwarranted intrusion protected by the Fourth Amendment to the United States Constitution.

After a brief hearing, the Lower Court granted the relief sought by the Petition.

## REASONS FOR GRANTING THE WRIT

The District Court and the Sixth Circuit Court of Appeals have misapplied the holding in *Bellis* v. *United States,* 40 L.ed2d 678, so as to negate any and all privilege that Petitioner may have in his private records or those of his clients and by allowing an IRS Agent to use a Summons compelling the Petitioner to give up his records when no probable cause exists to believe that a crime has been committed, violates the provisions of the Fourth and Fifth Amendments to the United States Constitution.

## ARGUMENT AND LAW

In the case relied upon by Respondent and by the Lower Court in the issuance of the Order appealed from, *Bellis* v. *United States,* 40 L.ed2d 678, it is to be noted that the *Bellis* case was the enforcement of a Subpoena from a Grand Jury and not the administrative issuance of a Summons by a Special Agent of the Internal Revenue Service, hence, the Petitioner submits that the case at bar is readily distinguishable from *Bellis.*

### I. THE PETITIONER ASSERTS AS "PRIVILEGED" THE FINANCIAL RECORDS OF HIS LAW PRACTICE.

Further, the Petitioner contends that the privilege against self-incrimination apply not only to oral testimony but to communications in documentary form as well. See *Boyd* v. *United States,* 116 U.S. 616 (1886); and *Gilbert* v. *California,* 384 U.S. 757 (1965). The Court reiterated that the Fifth Amendment protects all testimony or communicative evidence, including books and records. There is an inherent unfairness in co-mingling of civil and crim-

inal proceedings which should be constitutionally protected. See *U. S.* v. *Parrott,* 248 F.Supp. 196, 202 (D.D.C. 1965) (SEC Case); see also *U. S.* v. *Detroit Vital Foods,* 407 F.2d 570 (6th Cir., 1969).

It is important to note that the *Bellis* case preserves the privilege by citing at the end of said Opinion, *U.S.* v. *Slutsky,* 352 F.Supp. 1105 (SDNY, 1972); In re Subpoena Duces Tecum, 81 F.Supp. 418, 421 (ND Cal, 1948).

Petitioner cites in support of his position that the law is set out in *U.S.* v. *Kleckner,* 273 F.Supp. 251 (1967), wherein the Court upon a similar Petition to enforce an Internal Revenue Summons, the District Court, Weinman, C. J., held that in view of the fact that the taxpayer's returns had been assigned to a Special Agent of the Intelligence Division, the purpose of Subpoenaes addressed to taxpayer was not to obtain financial records relevant to a civil proceeding for the collection of income tax, but rather it was to obtain information for the filing of a criminal action, and taxpayer would not be required to produce the papers sought because of the privilege against self-incrimination. Enforcement denied. Appeal dismissed, 6th Cir., *382 F.2d 1022.*

In the instant case, a hearing was held before the Court on August 15, 1974, and the Court's attention is directed to Page 31a of the Appendix and Transcript of said proceedings wherein the question was asked of Special Agent Rehling, Respondent herein:

> "Q. And if I do this, you would use that information in a criminal action if you thought you deemed it advisable, would you not?
> A. Yes sir."

Clearly indicating that Special Agent Rehling is making a criminal investigation and would, in fact, use the informa-

tion which he seeks to compel Petitioner to produce evidence against himself.

## II. THE USE OF A "SUMMONS" ISSUED TO THE TAXPAYER-PETITIONER BY RESPONDENT, A SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE ENGAGED IN GATHERING EVIDENCE FOR A CRIMINAL PROSECUTION, IS AN UNWARRANTED INTRUSION ON THE PETITIONER UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION.

In the case at bar, the use of an administrative Summons to investigate and gather evidence for a criminal prosecution against the Petitioner violates the protection afforded the Petitioner by the Fourth Amendment to the United States Constitution in that same constitutes an unreasonable search and intrusion into the Petitioner's personal and private affairs and papers.

It is the contention and argument of the Petitioner that the language of the Internal Revenue Code authorizing the compulsory production of records is directed solely to the determination and collection of civil tax liabilities (See I. R. C. § 7602, et. seq.). Nothing in the Internal Revenue Code sanctions the issuance of a Summons in aid of a criminal investigation. See *U. S.* v. *O'Connor,* 118 F.Supp. 248, 250 (D.Mass., 1953). Nor does the Code confer any general investigatory power from which the necessary authorization could be implied. In preparing a criminal prosecution, the Grand Jury is the only appropriate medium for the preliminary investigation of crime. See *Jones* v. *Securities & Exchange Commission,* 298 U.S.

1, 27 (1936); See also *Hubner* v. *Tucker,* 245 F.2d 35 (9th Cir. 1957).

## III. DOES THE FILING OF IRS FORM 1065 BY ATTORNEYS ASSOCIATED TOGETHER IN THE PRACTICE OF LAW PRECLUDE THEIR INDIVIDUAL CLAIM OF PRIVILEGE?

Although it is quite evident that the Respondent has proceeded on the assumption that a partnership existed for the year 1971 and 1972, it is to be noted that upon reading the original Petition, at no point in the Petition filed by Respondent does the Respondent allege the existence of a partnership and since the allegations of the Petition are denied by the Petitioner's Answer, it is the position of the Petitioner that the pleadings joined at issue fail to state a cause of action against this Petitioner upon which relief should have been granted to the Respondent.

Second, it is the position of the Petitioner that no partnership such as found in *Bellis* existed (*Bellis* was formal and written), hence, the Petitioner is within his constitutional right in asserting that he does not have to bear witness against himself by furnishing his personal records to a Special Agent of the Internal Revenue Service who is admittedly making a criminal investigation. This is especially true as to the year 1971, since even if the Court found that a partnership did exist between Mr. Beasley and Mr. Cobb, Mr. Beasley being now deceased, Mr. Cobb is the only surviving member of said alleged partnership and has sole possession, custody and control of all records pertaining to 1971.

Third, Petitioner now finds that the law office association that he shares may not, in fact, meet the definition of a

partnership under Kentucky law, whereas, the Court in effect found that *Bellis* did, in fact, meet all of the specifications of a partnership under Pennsylvania law. Despite the fact that a partnership return (Form 1065) was filed for both years, perhaps a closer look at the facts and law reveal a different situation.

*Section 362.180* of the Kentucky Revised Statute sets forth the rules for determining the existence of a partnership within the Commonwealth of Kentucky. The relevant provisions of *362.180(2); 362.180(3);* and *362.180 (4)* are as follows:

> *K.R.S. 362.180(2)* Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property;
>
> *KRS. 362.180(3)* The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;
>
> *KRS 362.180(4)* The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> (a) As a debt by instalments or otherwise;
>
> (b) As wages of an employe or rent to a landlord;
>
> (c) As an annuity to a widow or representative of deceased partner;
>
> (d) As interest on a loan, though the amount of payment vary with the profits of the business;

(e) As the consideration for the sale of a good will of a business or other property by instalments or otherwise.

As can clearly be seen from the language of *KRS. 362.180(2)*, the mere joint ownership of any property (including a bank account) ". . . does not of itself establish a partnership . . ." As a point of fact, all office furniture and equipment used during the years 1971 and 1972 were acquired prior to Mr. Beasley's entrance into the practice of law with the Appellant. Moreover, the majority of the law library was acquired by the Appellant prior to Mr. Beasley's and, of course, Mr. Oldfield's entrance into the practice of law with the Appellant.

*Section 362.180(3)* provides that the mere *sharing* of gross returns does not a partnership make. As can be clearly seen from the facts set out above, there was a *sharing* of gross receipts in that they were deposited in a joint account and a *sharing* of expenses. However, again it should be noted as a point of fact that many of the expenses in the years in question, i.e., rent, telephone, electric, equipment maintenance, and library expenses, were billed to Appellant personally and did not include the name of Peter F. Beasley and/or Peter F. Beasley and William C. Oldfield and Appellant can only assume that should payment not have been forthcoming on these accounts, that he, and he alone, would have been the target of any collection efforts by these creditors.

In addition to these factors concerning rent, telephone and other related office expenses, it should be noted that neither Mr. Beasley nor Mr. Oldfield was required to pay any sum upon their entering the practice of law with Appellant or to compensate Appellant for these assets owned entirely by Appellant for, in some cases, a substantial

period of time. Likewise, fees collected after these gentlemen entered the practice, but as a result of cases obtained by Appellant prior to their entering the practice, were placed in the common account subject to the "draws" of anyone.

*Subsection (4) of KRS. 362.180* provides that receipt of a share of the profits of a business is prima facie evidence of the existence of a partnership. This provision, at least on first reading, appears to be in direct conflict with the provisions of *Subsection (3) of 362.180*, however, a more careful analysis reveals what appears to be certain distinguishing factors.

It is submitted that use of the words ". . . a share of the profits . . ." in *Subsection (4)* presupposes the existence of some sort of definite, prearranged contract or agreement to divide profits with a certain percentage going to each member. In fact, the Kentucky Court of Appeals so held in *Smith* v. *Kelly, et. al.*, 465 SW2d 39 (1971). In *Smith*, the Kentucky Court held "A partnership is a contractual relationship and the intention to create it is necessary." *Smith at Page 40*. In *Smith*, there was no written agreement and Smith was given a "draw" each month plus a small amount from the profits at the end of each year. However, during the time Smith was associated with Kelly and one Galloway, Smith was held out to the public as a partner, contracted with a third party as a partner, filed partnership tax returns, so designated themselves as a partnership with the Kentucky Board of Accountancy and filed as a partnership with Smith as a partner.

Thus, based upon the above discussion, it becomes doubtful that a partnership under Kentucky law existed prior to the year 1973. There is no question that a partnership return (Form 1065) was filed for the years 1971

and 1972, however, as the Court well knows, this is only an informational return. Expenses of the law office were deducted on the partnership return for the years in question, however, this action produced no tax advantage or disadvantage as expenses could have been pro-rated and deducted on a "Schedule C" attached to a Form 1040 without any change in the tax liability at all.

## CONCLUSION

It is not logical that after the Respondent (a criminal investigative agent) testified that he will use information he obtains from the Petitioner against him, that the Petitioner must, in obedience to an administrative Summons, bear witness against himself. Such a conclusion is repugnant to the individual's right to privacy and the Fifth Amendment's privilege against bearing witness against one's self.

Further, the conclusion of the Lower Court ignores the undisputed facts that Respondent initiated his first interview with the Petitioner by reading Petitioner his rights and then admonishing the Petitioner that he didn't have to talk to the Respondent at all.

If the Respondent concedes that Petitioner doesn't have to talk to the Respondent, what distinction is there between being compelled to talk and being compelled to furnish your personal written records?

The Fourth Amendment to the United States Constitution protects one against unreasonable search and seizures of his records and property, unless a proper Affidavit of probable cause to suspect a crime has been made before a Magistrate. No such Affidavit has been made or can be made, and hence, for the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

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Counsel for Petitioner

## APPENDIX A

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### AMENDMENT 4

**[Unreasonable searches and seizures.]**—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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### AMENDMENT 5

**[Criminal actions—Provisions concerning—Due process of law and just compensation clauses.]**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX B

No. 75-1034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and
CHARLES T. REHLING, Special Agent
of the Internal Revenue Service,

Plaintiffs-Appellees,

v.

JAMES L. COBB, JR.,

Defendant-Appellant.

## ORDER

(Filed May 16, 1975)

Before: MILLER and ENGEL, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge

This is an appeal from an order of the United States District Court for the Southern District of Ohio enforcing an Internal Revenue summons in proceedings brought under §§ 7402 (b) and 7604 (a) of the Internal Revenue Code of 1954.

Respondent is a practicing attorney in Covington, Kentucky, and the summons was directed toward production of certain records of a law partnership used in the preparation of a 1971 partnership return for the law firm of Peter F. Beasley and James L. Cobb, Jr., and like records

relating to the 1972 partnership return of the law partnership of Cobb, Beasley and Oldfield. Refusal to obey the summons and objection thereto both before the District Court and here is based upon the respondent's claim that disclosure is barred upon the respondent's assertion of his Fifth Amendment privilege against self-incrimination, that the use of the summons to obtain such information in the face of the exercise of the privilege amounts to an unwarranted intrusion upon the respondent under the Fourth Amendment, and finally that the lower court erred in finding that a partnership existed so as to bring the case within the holding of *Bellis* v. *United States,* 417 U.S. 85 (1974).

In a carefully worded opinion, District Judge Timothy Hogan granted enforcement, finding that the records sought pertain to a partnership within the meaning of applicable Kentucky law, but carefully limited the scope to exclude client files as distinguished from financial records and to limit any testimony of respondent to the identification of the records produced.

Upon the disputed facts before him, the trial judge found that the records sought were those of the law partnerships for the years in question and not of the respondent personally, and that therefore, this case was controlled by *Bellis* v. *United States,* supra. While it is true that *Bellis* dealt with the productions by summons of records for purposes of a grand jury investigation, we see no difference between that use and the use here, even though the special agent acknowledges that the investigation involved is both criminal and civil.

Accordingly, it appearing that the factual finding of the trial judge that the petitioners had "carried the burden of establishing the existence of the two partnerships" is

not clearly erroneous and that the district judge properly applied the law in issuing the order of enforcement,

IT IS ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

## APPENDIX C

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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CIVIL ACTION NO. C 1 74-323

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UNITED STATES OF AMERICA and CHARLES T. REHLING, Special Agent of the Internal Revenue Service,
Petitioners,

v.

JAMES L. COBB, JR.,
Respondent.

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## FINAL ORDER

(Filed October 9, 1974)

In accordance with the findings and conclusions contained in the Court's memorandum herein filed on September 26, 1974, it is

ORDERED that James L. Cobb, Jr. appear before Special Agent Charles T. Rehling at a mutually agreeable time and place within twenty (20) days of the date of this order to testify and produce for examination and copying, the following documents:

> All of the records used in the preparation of the 1971 partnership return (Treasury Form 1065) of the law partnership of Peter F. Beasley and James L. Cobb, Jr. and the 1972 partnership return (Treasury Form 1065) filed under the name of the law

partnership of COBB, BEASLEY, & OLDFIELD, and including specifically the following records of the said partnerships:

the general ledger, the cash receipts journal, the cash disbursement journal, the expense journal, all bank statements, all work papers, summaries and working trial balances.

Provided however, that client files, as distinguished from financial records, are expressly excluded from the scope of this order and that the testimony required of James L. Cobb, Jr. is limited to the identification of the records produced. It is further

ORDERED that if the parties cannot agree on the time and place for compliance with the summons, the petitioner, Special Agent Rehling, shall designate such time and place and shall give the respondent written notice thereof at least five (5) days prior to said date.

Dated: October 8, 1974.

/s/ TIMOTHY S. HOGAN
United States District Judge

/s/ BYRON E. TRAPP
Assistant U. S. Attorney

/s/ RALPH WINKLER
First Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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NO. C 1 74-323

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UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

JAMES L. COBB, JR.,
Respondent.

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**MEMO**

(Filed September 26, 1974)

This case is before the Court on the petition of the United States seeking enforcement of an Internal Revenue summons. An order to show cause was issued, an evidentiary hearing has been held, an answer has been filed, and the matter argued and briefed by counsel.

For the tax year 1971, the respondent was party to the filing of a Partnership Income Tax Return (Federal — Informational). The partnership return indicated the existence of a Kentucky partnership during 1971, known as Cobb and Beasley, for the practice of law, and that the respondent was a member.

For the tax year 1972, the respondent was party to the filing of a Partnership Income Tax Return (Federal — Informational). The return indicated the existence of a Kentucky partnership during 1972, known as Cobb,

Beasley and Oldfield, for the practice of law, and that the respondent was a member thereof.

The I.R.S. initiated an investigation into the individual tax liability of the respondent which included the years 1971 and 1972. The matter received the attention of an agent of the I.R.S. and, subsequently, both of the agent and a Special Agent. The investigation in which the Special Agent is involved is both criminal and civil, and it is conceded that the information sought by the I.R.S. summons would be used as evidence against respondent if it disclosed or became relevant to any criminal violation of the Income Tax Laws.

The summons which is the subject of this proceeding was issued to "Messrs. P. F. Beasley, James L. Cobb, Jr., and W. C. Oldfield, operating under the firm name of Cobb, Beasley and Oldfield." It was served on the respondent Cobb. It required appearance before the Special Agent, the giving of testimony relative to the tax liability of the person named, and required the production of "all of the records used in the preparation of the 1971 partnership return (Treasury Form No. 1065) of the law partnership of Peter F. Beasley and James L. Cobb, Jr., and the 1972 partnership return (Treasury Form No. 1065) filed under the name of the law partnership of Cobb, Beasley and Oldfield and including specifically the following records of said partnerships — the general ledger, the cash receipts journal, the cash disbursements journal, the expense journal, all cancelled checks, all bank statements, all work papers, summaries and working trial balances."

The respondent declined to appear at the designated time and place on the ground that "the subpoena violates the constitutional privilege of the respondent" (self-incrimination) and, on the same ground, has filed a motion in this proceeding to quash the subpoena.

The respondent does not question his possession and control of whatever records, if any, were the basis for the partnership returns.

It is not claimed that either Oldfield or Beasley is in any family relationship with respondent. The relationship is at least purely professional and business.

It is not questioned that

a) during 1971 and 1972 the individuals held themselves out as partners;

b) a common bank account was maintained and each individual involved, at the respective time, had a right of withdrawal; and

c) the individuals concerned were willing parties to the filing of a Federal Partnership Return;

d) under Kentucky law partnerships bear the indicia of legal entities, at least sufficient to be treated as distinct entities for purposes of Federal Tax laws.

The United States relies heavily on *Bellis* v. *United States,* — U.S. — No. 73-190. The respondent seeks to distinguish that case mainly on the ground that a partnership is contractual, neither of these claimed partnerships involved any formal written partnership agreement, and that no tax advantage was obtained from adopting or representing the adoption of the partnership form.

A partnership is, of course, contractual but, as a matter of general and well settled law, no formal written agreement is necessary and the arrangement may be otherwise shown. This record is sketchy with respect to the actual arrangements involved but, based on the record, the petitioners have carried the burden of establishing the ex-

istence of the two partnerships. There really is no evidence contra.

It is therefore the conclusion of this Court that *Bellis* is controlling for the reasons stated in that case, which do not require repetition here. The question therein, determined in the negative, was and is "whether a partner in a small law firm may invoke his personal privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of the partnership financial records." The reason is that the partnership is recognized as an independent entity, apart from its individual members, and that an individual may not rely on the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity.

The petition is granted and an appropriate order directing the production of the records may be prepared and presented.

Two things — (1) client files, as distinguished from financial records, should be expressly excluded from the scope of the order, and (2) it should be clear that the "testimony" required is limited to the identification of the records produced.

/s/ TIMOTHY S. HOGAN
United States District Judge

## APPENDIX D

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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CIVIL ACION NO. C 1 74-323

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UNITED STATES OF AMERICA and CHARLES T. REHLING, Special Agent of the Internal Revenue Service,

Petitioners,

v.

JAMES L. COBB, JR.,

Respondent.

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### PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

(Filed ————)

The United States of America and Charles T. Rehling, Special Agent of the Internal Revenue Service, by their attorney, William W. Milligan, United States Attorney for the Southern District of Ohio, show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402 (b) and 7604 (a) of the Internal Revenue Code of 1954 to judicially enforce an Internal Revenue Service summons.

II

The petitioner, Charles T. Rehling is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director of Internal Revenue in Cincinnati, Ohio.

III

The respondent, James L. Cobb, Jr., resides at 969 Sutton Road, Cincinnati, Ohio 45230.

Special Agent, Charles T. Rehling is conducting an investigation for the purpose of ascertaining the correctness of income tax returns filed by James L. Cobb, Jr., for the years 1971 and 1972, as is set forth in the affidavit of Special Agent Rehling, attached hereto as Exhibit A.

V

The respondent, James L. Cobb, Jr. is in possession and control of testimony and documents concerning the above-described investigation.

VI

On June 6, 1974, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit B, was issued by the petitioner, Charles T. Rehling directing the respondent, James L. Cobb, Jr., to appear before the said Special Agent, on June 21, 1974, at 10:00 A.M., at Room 308 7th and Scott Streets, Covington, Kentucky, to testify and to produce for examination books, records and other papers, all of which are fully described in the summons attached hereto as Exhibit B. A copy of this summons was personally served on James L. Cobb, Jr.,

on June 6, 1974, as is set out in the affidavit of the petitioner, Charles T. Rehling, attached hereto as Exhibit A.

VII

On June 21, 1974, the respondent, James L. Cobb, Jr., did not appear in response to the summons. The respondent's refusal to comply with the summons continues to date as is set forth in the affidavit of Charles T. Rehling, attached hereto as Exhibit A.

VIII

It was and is now essential to the determination of the correct tax liability of James L. Cobb, Jr., for the years 1971 and 1972, that the respondent be required to appear and produce the documents, records and other information sought in the summons and to give testimony regarding those documents and records as is evidenced by the affidavit of Charles T. Rehling which is attached hereto as Exhibit A.

WHEREFORE, the petitioners, the United States of America and Charles T. Rehling respectfully pray:

1. That this Court enter an order directing the respondent James L. Cobb, Jr. to show cause, if any he has, why he should not comply with and obey the summons attached hereto as Exhibit B in each and every requirement thereof;

2. That this Court enter an order directing the respondent, James L. Cobb, Jr., to obey the summons attached hereto as Exhibit B in each and every requirement thereof by ordering the attendance and production of the records as is required and called for by the terms of

the summons before the petitioner, Charles T. Rehling, or any other proper officer of the Internal Revenue Service, at such time and place as hereafter may be fixed by the petitioners, or any other proper officer of the Internal Revenue Service, and by ordering the respondent to appear for the purpose of giving testimony concerning the tax liability of James L. Cobb, Jr., as to each or any of the years 1971 and 1972; and

3. That this Court grant such other and further relief as it deems just and proper.

WILLIAM W. MILLIGAN
United States Attorney

By: .....
Assistant United States Attorney

# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-237

JAMES L. COBB, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below enforcing an Internal Revenue summons requiring production of the books and records of a law partnership of which he is a partner.

The pertinent facts are as follows: In connection with an investigation of petitioner's individual income tax liability, the Internal Revenue Service issued a summons to "Messrs. P. F. Beasley, James L. Cobb, Jr., and W. C. Oldfield, operating under the firm name of Cobb, Beasley and Oldfield." The summons was served on petitioner and required him, *inter alia,*



594-005—75——1

to produce and turn over various records used in the preparation of the 1971 and 1972 law partnership returns to which he was a party. Petitioner refused to comply with the summons on the ground that compelled production would violate his privilege against self-incrimination.

The district court enforced the summons, finding that the requested documents were partnership records, within the meaning of applicable Kentucky law. The court held that the case was controlled by this Court's decision in *Bellis* v. *United States,* 417 U.S. 85 (Pet. App. C 7a–10a).[1] The court of appeals affirmed by order (Pet. App. B 2a–4a).

The courts below correctly recognized that this case is squarely controlled by *Bellis.* There, this Court held that the personal privilege against self-incrimination of one of the partners does not bar the compelled production of the records of a partnership.[2] The fact that *Bellis* involved a grand jury subpoena rather

[1] The district court's order excluded petitioner's client files, and any testimony by petitioner other than that necessary to identify the financial records produced (Pet. App. C 10a).

[2] Although petitioner argues (Pet. 8) that there was a formal partnership agreement in *Bellis*, the existence of such an agreement was not a consideration in the decision. Indeed, the record was unclear on this point (see 417 U.S. at 96, n. 4). Moreover, petitioner's further argument (Pet. 8) that he was the sole surviving member of the partnership and had "sole possession, custody and control of all records" does not support his claim of privilege, for *Bellis* held that the dissolution of a partnership does not permit the custodian of partnership records to claim his personal privilege with respect to such records (417 U.S. at 96, n. 3).

than an Internal Revenue summons does not distinguish the cases. Both a grand jury subpoena and an Internal Revenue summons are well established legal processes to secure testimony and the production of documentary evidence.

Petitioner also argues (Pet. 7) that production would constitute an unreasonable search and seizure within the meaning of the Fourth Amendment because, in his view, "[n]othing in the Internal Revenue Code sanctions the issuance of a Summons in aid of a criminal investigation." But in *Donaldson* v. *United States,* 400 U.S. 517, 535, this Court observed that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct." In the absence of a recommendation by the Internal Revenue Service for criminal prosecution prior to the issuance of the summons, its enforcement is expressly sanctioned by *Donaldson.*[3]

Finally, petitioner challenges the finding of the district court—affirmed by the court of appeals as not

[3] Petitioner appears to rely principally (Pet. 6) on *United States* v. *Kleckner*, 273 F. Supp. 251 (S.D. Ohio), appeal dismissed, 382 F.2d 1022 (C.A. 6). But *Kleckner* involved purely private papers, and not records of a collective entity held in a representative capacity. Two other cases cited by petitioner (Pet. 6), *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y.), and *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 421 (N.D. Cal.), were cited in *Bellis* (417 U.S. at 101) for the proposition that the privilege might be available where, unlike here, the records sought are those of a "small family partnership." In *Boyd* v. *United States*, 116 U.S. 616, also cited by petitioner (Pet. 5), the records sought were partnership records but were nevertheless treated as purely private papers. See *Bellis* v. *United States*, *supra*, 417 U.S. at 91–92.

clearly erroneous (Pet. App. B 3a–4a)—that the existence of a partnership had been proved. Here, it is undisputed that petitioner practiced law in association with other lawyers, that the relationship was purely professional in nature, that they held themselves out as partners, that they shared a common bank account, and that they knowingly filed federal partnership returns for the years at issue (Pet. App. C 9a). As the court of appeals concluded (Pet. App. B 3a–4a), there was ample evidence to support the district court's finding of a partnership. Such a factual question does not warrant further review by this Court. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

OCTOBER 1975.

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